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No. 90-799

In the Supreme Court of the United States

OCTOBER TERM, 1990

CHARLES HOUSTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Under *United States* v. *Grostefon*, 12 M.J. 431 (C.M.A. 1982), a servicemember may himself raise legal claims that his counsel has decided not to present to a military appellate court. The question presented is whether that practice violates the Due Process Clause.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rules:

Statutes and rules--Continued: Page

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OPINIONS BELOW

The opinions of the Air Force Court of Military Review, Pet. App. 1a-3a, 4a-7a, are unreported. The opinions of the Court of Military Appeals, Pet. App. 8a, 9a, are not yet officially reported. An earlier order of the Court of Military Appeals is reported at 30 M.J. 21.

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 23, 1990. The petition for a writ of certiorari was filed on November 20, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a general court-martial at Spangdahlehm Air Base in Germany, petitioner, a member of the United States Air Force, was convicted of rape, anal sodomy, carnal knowledge, and indecent acts with his teenage daughter, in violation of Articles 80, 120, 125, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 880, 920, 925, and 934. Petitioner was sentenced to confinement for 14 years, a dishonorable discharge, and a reduction to the lowest enlisted rank. The convening authority approved the findings and, acting pursuant to the terms of a pretrial agreement, reduced the term of confinement to 13½ years. The remainder of the sentence was approved as adjudged.

1. Petitioner does not challenge any aspect of his court-martial. His sole claim is directed to one narrow aspect of the military appellate process stemming from the decision by the Court of Military Appeals in *United States* v. *Grostefon*, 12 M.J. 431 (1982).

In *Grostefon*, the defendant's appointed military appellate counsel did not bring to the attention of the court of military review a claim that the defendant himself believed to be a valid basis for reversal. Drawing on the concerns discussed in *Anders* v. *California*, 386 U.S. 738 (1967), and the Second Circuit's decision in *Barnes* v. *Jones*, 665 F.2d 427 (1981), rev'd, 463 U.S. 745 (1983), the Court of Military Appeals concluded that an appointed military appellate defense lawyer should bring to the attention of military appellate courts any issue that his client wishes the court to consider. The purpose of the *Grostefon* rule is to ensure that no servicemember believes that his attorney, who is usually a military officer detailed to the task, has failed to raise a par-

ticular claim because of command influence. *United States* v. *Healy*, 26 M.J. 394, 397 (C.M.A. 1988). Thus, military appellate counsel are required "to invite the attention of the Court of Military Review or of [the Court of Military Appeals] to issues specified by an accused." *Ibid.*

2. After petitioner was convicted, he appealed his case to the Air Force Court of Military Review. Petitioner's counsel asserted that petitioner was denied a fair sentencing hearing because the prosecutor misstated petitioner's length of service during argument on the appropriate sentence. Assignment Of Errors And Brief On Behalf Of Accused (Jan. 18, 1989).[1] No other errors were assigned. The court of military review considered and rejected that claim on the merits, and affirmed petitioner's sentence. Pet. App. 1a-3a.[2]

3. Petitioner then sought review in the Court of Military Appeals. Petitioner's counsel did not renew the claim that he had raised in the court of military review. Instead, petitioner's counsel filed a *Grostefon* brief based on an affidavit submitted by petitioner. Motion To File Affidavit (Dec. 6, 1989); Pet. App. 4a-7a. In the affidavit, petitioner recited a litany of complaints against his trial defense counsel and the Air Force. Petitioner's appellate counsel distilled

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[1] At trial, the prosecutor informed the trial judge that petitioner had slightly more than 17 years of prior service, instead of the correct amount of more than 20 years. Tr. 50; PX 1.

[2] The Air Force Court of Military Review found that the trial judge had ample evidence before him of petitioner's actual length of service, notwithstanding the prosecutor's misstatement. Additionally, that court determined petitioner's sentence was appropriate for the offenses committed "regardless of his length of service." Pet. App. 3a.

those complaints into three errors that he then submitted to the Court of Military Appeals: (1) the government was negligent in trying petitioner's case; (2) petitioner was denied the effective assistance of counsel at trial; and (3) petitioner's sentence was inappropriate. Supplement To Petition For Grant Of Review (Dec. 6, 1989).

4. In order to have petitioner's allegations considered by a court with fact-finding power,[3] the government moved to have the case remanded to the court of military review. Motion For Remand (Dec. 8, 1989). The Court of Military Appeals granted the government's motion and remanded the case to the court of military review. Pet. App. 8a. The Air Force Court of Military Review subsequently affirmed petitioner's convictions and sentence a second time, finding that his assertions were "devoid of merit and totally unfounded." Pet. App. 6a.

5. Petitioner's appellate defense counsel filed the identical *Grostefon* brief with the Court of Military

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[3] The Court of Military Appeals does not have fact-finding authority, but the courts of military review have such authority pursuant to Art. 66(c) of the UCMJ, 10 U.S.C. 866(c). Article 66(c) provides as follows:

> In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

The Court of Military Appeals has described this fact-finding authority as "awesome, plenary, *de novo*." *United States* v. *Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

Appeals. Additional Supplement To Petition For Grant Of Review (July 6, 1990). The Court of Military Appeals granted review and summarily affirmed. Pet. App. 9a.

ARGUMENT

Petitioner maintains that the *Grostefon* rule violates due process, because an attorney who files a *Grostefon* brief is not acting as an advocate on behalf of his client. Pet. 6-7. That claim is clearly without merit.[4]

The California rule criticized in *Anders* allowed an attorney to withdraw from a case on appeal without filing a brief on behalf of an indigent defendant. The rule adopted in *Grostefon* clearly does not violate *Anders* because the *Grostefon* rule does not in any

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[4] It is not clear that this question is subject to review in this Court. The statutes authorizing this Court to review by a writ of certiorari the judgments of the Court of Military Appeals, 10 U.S.C. 867(h)(1) and 28 U.S.C. 1259(3), restrict this Court's certiorari jurisdiction to "decisions" of the Court of Military Appeals. Section 867(h)(1) of Title 10 further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The Court of Military Appeals has the statutory authority to limit its decisions in any case to less than all of the questions presented by a defendant. 10 U.S.C. 867(d). Petitioner did not present to the Court of Military Appeals the due process claim that petitioner has now raised in his certiorari petition. Accordingly, it is not clear that that court rendered a "decision[]" on the question that petitioner has presented in his petition, within the meaning of 10 U.S.C. 867(h)(1).

That question does not require an answer in this case, however, since the question presented in the certiorari petition does not warrant review by this Court in any event.

way release the military appellate defense lawyer from his obligation to serve as an advocate for his client. The *Grostefon* rule simply imposes an additional requirement atop the one required by military law and *Anders*.

Under military law, a servicemember is entitled to be represented by military appellate defense counsel at government expense before the courts of military review, the Court of Military Appeals, and this Court, regardless of indigency. Art. 70, UCMJ, 10 U.S.C. 870; Rule for Courts-Martial 1202, *Manual for Courts-Martial, United States—1984* (*Manual*).[5] Military appellate defense counsel are obligated to render their best professional efforts on behalf of their clients. Art. 70, UCMJ, 10 U.S.C. 870; *United States* v. *Hullum*, 15 M.J. 261, 267 (C.M.A. 1983).[6] Petitioner does not claim that his appellate counsel provided less than competent representation, Pet. 3 n.2, and there is no indication in the record that petitioner's appellate counsel failed in any way to fulfill her professional responsibilities.

Grostefon does not allow military appellate defense counsel to withdraw from a case simply by filing with a military appellate court a list of the claims that a servicemember believes should be heard by a

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[5] Servicemembers also have the right to be represented by civilian counsel at their own expense. 10 U.S.C. 870(d).

[6] Military appellate counsel are subject to the same basic rules of professional responsibility as their civilian counterparts. See Rule 5.4, Air Force Rules of Professional Responsibility; Standard 4-8.4, Air Force Standards for the Administration of Criminal Justice; Department of the Army Pamphlet 27-26, Legal Services Rules of Professional Conduct for Lawyers, Rule 1.3; Coast Guard Military Justice Manual, Chapter 6, COMDTINST M5810.1B; Navy JAGINST 5803.1, Rules of Professional Conduct, Rule 1.1.

court. Rather, *Grostefon* imposed an additional requirement on counsel, beyond those required by the *Anders* decision; *Grostefon* required that defense counsel bring to the court's attention any claims that a servicemember himself believes should be considered. That rule, of course, is not constitutionally required. In *Jones* v. *Barnes*, 463 U.S. 745 (1983), this Court held that an indigent defendant has no constitutional right to require appointed appellate counsel to urge non-frivolous claims proposed by the defendant if his counsel, as a matter of professional judgment, decides not to advance them. But it is incorrect to suggest that the *Grostefon* rule (one that two Members of this Court believed was constitutionally required, see *Jones* v. *Barnes*, 463 U.S. at 755-764 (Brennan, J., dissenting)) is constitutionally prohibited just because the claims advanced by a servicemember defendant may often lack merit. Pet. 6. The Constitution requires only that an indigent defendant be given an attorney who can advocate his client's case. It does not require that the lawyer be free to silence his client over the latter's objection. Since the *Grostefon* rule does not in any way undermine a military defendant's right to the effective assistance of counsel or otherwise render the appellate proceedings unfair, it is not unconstitutional.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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